

Issue: Qualification, Discrimination/Race and Age; Retaliation/Grievance Activity, EEOC charges; Ruling dated: May 25, 2001; Ruling #2001-023; Agency: Department of Conservation and Recreation; Outcome: Not qualified. Appealed to Circuit Court of the City of Richmond; File Date: June 6, 2001; Case #HQ-1276; EDR decision affirmed.

***Department of Employment Dispute Resolution***

**QUALIFICATION RULING OF DIRECTOR**

In the matter of Department of Conservation and Recreation/ No. 2001-023  
May 25, 2001

The grievant has requested a ruling on whether his July 20, 2000 grievance with the Department of Conservation and Recreation (DCR) qualifies for a hearing. The grievant alleges that management discriminated against him based on his national origin, race, and age by failing to implement a hearing officer recommendation that DCR repeat and redesign its job selection process. The grievant also claims that management has retaliated against him because of prior protected activities, including his past use of the grievance procedure. For the reasons discussed below, this grievance does not qualify for a hearing.

**FACTS**

The grievant is employed as an Accountant Senior. The grievant's national origin is East Indian and he is over the age of forty. On January 27, 1999, the grievant applied for the position of Grants Program Administrative Manager, but was not selected for the position. Subsequently, on March 25, 1999, the grievant initiated a grievance in which he claimed that he had been discriminated against because of his national origin and age. The grievant also claimed that his non-selection was a form of retaliation for prior court and grievance activity.

An administrative hearing was held on February 15, 2000, in which the administrative hearing officer (AHO) concluded that she "ha[d] a problem with how the DCR conducted its candidate search."<sup>1</sup> While the hearing officer found that the grievant's scores did not appear to be an "accurate reflection of [his] strengths" and that his scores were "deflated,"<sup>2</sup> she made no finding of retaliation or discrimination based on national origin or age. To the contrary, the hearing officer stated that she "was in no way accusing [the Finance Director] of bias."<sup>3</sup> She nevertheless ordered DCR to repeat and re-design the selection process.<sup>4</sup> DCR appealed the decision to this Department, and on June 6, 2000, this Department found that the hearing officer had exceeded the scope of her authority by *ordering* DCR to repeat the selection process and to re-design the selection process. The parties were then advised that the hearing officer's instruction to repeat the selection process and to re-design the selection process should be viewed as a non-binding recommendation rather than a binding order.

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<sup>1</sup> February 24, 2000, Hearing Decision, page 1.

<sup>2</sup> *Id.*, page 2.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

On June 22, 2000, the grievant requested the Director of Administration to repeat the selection process for the Grants Program Administrative Manager position as recommended by the hearing officer. On the same day, the Director of Administration responded that the hearing officer's recommendations would not be implemented. The grievant subsequently filed his July 20, 2000 grievance in which he asserted that DCR would have implemented the recommendations had he not been a member of a protected class and had not previously participated in the grievance process.

On July 20, 2000, management responded that the grievant's July 20 grievance would not advance because the grievance challenged an agency decision regarding the implementation of a hearing officer's recommendation rather than an order and because it was "challenging the same action or arising out the same set of facts" as his prior grievance activity. The grievant appealed the compliance determination to this Department. On December 27, 2000, this Department ruled that the grievance was in compliance with the grievance process but only to the issue of whether DCR had discriminated and retaliated against the grievant by not implementing the hearing officer's recommendation. The grievance advanced and was later denied qualification by the agency head.

## DISCUSSION

### *Discrimination*

Grievances that may be qualified for a hearing include actions related to discrimination on the basis of national origin, race and/or age.<sup>5</sup> To qualify such a grievance for hearing, there must be more than a mere allegation of discrimination – there must be facts that raise a sufficient question as to whether the actions described within the grievance were the result of prohibited discrimination based on a protected status, in other words, that because of the grievant's national origin, race and/or age he was treated differently than other "similarly-situated" employees. If, however, the agency provides a legitimate, nondiscriminatory business reason for its action, the grievance should not be qualified for hearing, absent sufficient evidence that the agency's professed business reason was a pretext or excuse for discrimination.<sup>6</sup>

In this case, it is undisputed that the grievant is a member of a protected class based on his national origin, race and/or age. However, while the grievant submitted documentation and materials in support of his contention of discriminatory treatment, the evidence presented failed to raise a sufficient question of discrimination. Moreover, management has responded that the agency considered the grievant's request for implementation of the hearing officer's recommendation to repeat and redesign the selection process. But upon review, management determined that the selection process

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<sup>5</sup> See *Grievance Procedure Manual* § 4.1(b), page 10.

<sup>6</sup> *Hutchinson v. INOVA Health System, Inc.*, 1998 U.S. Dist. LEXIS 7723 (E.D. Va. 1998)(citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)).

had been fair, the final selection had been based on legitimate, job-related criteria, and that there was no cause to repeat or redesign the selection process. Further, because the hearing officer found no discrimination or retaliation, and her determination was a non-binding recommendation, the agency was not obligated under the hearing decision to repeat the selection or revise its selection process.

### *Retaliation*

The grievant also claims that management failed to implement the hearing officer's recommendation in retaliation for having engaged in the grievance process. For a claim of retaliation to qualify for a hearing, there must be evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity;<sup>7</sup> (2) the employee suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, whether management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, the grievance does not qualify for a hearing, unless the employee presents sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation.<sup>8</sup>

It is undisputed that the grievant engaged in a protected activity by his past use of the grievance process. For purposes of this ruling only, we will assume that management's decision not to implement the hearing recommendation was an adverse employment action. Thus, the only question remaining is whether a causal link exists between the prior grievance activity and management's decision not to implement the recommendation, in other words, whether management decided not to implement the recommendation because the grievant had initiated a prior grievance.

There is a close proximity in time between the prior grievance activity (which concluded in the spring of 2000) and management's decision in June, 2000 not to implement the recommendation. However, a proximity in time alone does not raise a sufficient question of retaliatory intent. Moreover, the agency has offered a legitimate business reason for its decision against implementation – it had reviewed the selection process and found that it had been conducted fairly and based on legitimate job-related criteria. Apart from the proximity in time, the grievant offers no evidence that management's stated reasons for its actions were only a pretext for retaliation.

### APPEAL RIGHTS AND OTHER INFORMATION

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<sup>7</sup> See the *Grievance Procedure Manual* §4.1(b)(4), page 10. Only the following activities are protected activities under the grievance procedure: "participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting a violation to the State Employee Fraud, Waste and Abuse Hotline, or exercising any right otherwise protected by law."

<sup>8</sup> See *Dowe v. Total Action Against Poverty in Roanoke Valley*, 145 F.3d 653 (4<sup>th</sup> Cir. 1998).

For information regarding the actions the grievant may take as a result of this ruling, please refer to the enclosed sheet. If the grievant wishes to appeal this determination to the circuit court, he must notify the human resources office, in writing, within five workdays of receipt of this ruling. If the court should qualify this grievance, within five workdays of receipt of the court's decision, the agency must request the appointment of a hearing officer unless the grievant notifies the agency that he does not wish to proceed.

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Director

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